

**SCRUTINY OF ACTS AND REGULATIONS COMMITTEE**  
**Inquiry into exceptions and exemptions in the Equal Opportunity Act**

Melbourne — 4 August 2009

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Dr A. Bendall, committee of management, Victorian Gay and Lesbian Rights Lobby.

**The CHAIR** — The next witness is Dr Anthony Bendall from the Victorian Gay and Lesbian Rights Lobby. Thank you for attending this public hearing. The purpose of these hearings is to report to the Parliament whether any amendments should be made to the exceptions and exemptions in the Equal Opportunity Act 1995. Anything you say or publish before the committee today is protected by parliamentary privilege. However, once you leave the hearing, anything you say or publish outside this room is not so protected.

I would now like to invite you to make a brief statement to the committee on the relevant issues that you consider important to your organisation concerning the inquiry, and we will conclude with questions.

**Dr BENDALL** — Thank you for the opportunity to provide evidence to the inquiry. The Victorian Gay and Lesbian Rights Lobby, which I refer to hereafter as ‘the lobby’, as it is a bit longwinded, has long called on the Victorian government to modernise the act. The lobby aims to achieve human rights, equality and social justice for lesbians, gay men, transgender, intersex and queer people. We do this by working with the media, undertaking and supporting research, conducting community education and directly lobbying politicians across all levels of government.

The lobby strongly supports the view that the exceptions in the act need to be reformed. We note that the objective of the act includes elimination, as far as possible, of discrimination. This is a bold and important objective which we strongly support. Yet we believe that many of the exceptions in the act mean that the objective cannot be achieved. We also believe that many of the exceptions in the act mean that the act is not consistent with section 8 of the Charter of Human Rights and Responsibilities. In particular, we are concerned that many of the exceptions in the act mean that subsection 8(3) of the charter cannot be achieved — that is, the exceptions prevent the right to equal and effective protection against discrimination.

In addition to the legal basis for the need to reform the exceptions, the lobby also believes that many of the exceptions create economic and social costs for the state of Victoria. This is because the exceptions detract from the realisation of the objective of the act — the elimination of discrimination. It is the lobby’s view that limitations should not be widely cast, arbitrary or unreasonable, and should be subject to challenge and review. We note, however, that the purpose of section 8(4) of the charter is to recognise that substantive equality is not necessarily achieved by treating everyone equally and that special measures may be required to achieve equality for some groups in the community. In light of that we acknowledge and strongly support many of the exceptions in the act that are designed to allow for special measures to protect particular minorities.

There are a number of exceptions that in our view are not justifiable in their current form, pursuant to section 7(2) of the charter, which are set out in our written submission. I will not go into those in detail unless you have questions about them.

For the LGBTI community, the provisions dealing with religious bodies, religious schools and religious beliefs or principles in section 75, section 76 and section 77 are probably the most concerning. The lobby acknowledges the intention of subsection 75(1), which allows religious bodies to discriminate with regard to particular religious appointments — that is, for priests and others who perform religious practices. However, in our view the other provisions are simply too broad and are clearly contrary to the intention of the act. Some religious groups adopt practices that suggest that the exceptions give them a licence to discriminate. This has direct and harmful consequences in situations as broad as health care, schools, foster and substitute care, as well as in access to a range of social welfare services and organisations.

Of particular concern is the broad exception for religious schools which provide for a school to deny employment to LGBTI teachers and other staff. We see this as a particularly insidious way in which to reinforce and proselytise discriminatory beliefs and biases. In our view that exception should either be removed or reformulated.

One alternative would be to redraft the provision along the lines of section 51(2) of the Tasmanian Antidiscrimination Act 1998. That provision allows discrimination in employment by an educational institution, but only if the discrimination is in order to enable, or better enable, the educational institution to be conducted in accordance with the tenets, beliefs, teachings, principles or practices of the relevant religious institution. If that was done, however, our view is that the onus of proof should be on the school to justify the practice in the terms of section 7 of the charter.

The lobby also supports the continuation of a carefully managed process to allow for the granting of exemptions from operation of the act in limited circumstances by the Victorian Civil and Administrative Tribunal. We believe that, where it is proposed that an exemption be granted, the tribunal should be able to, or perhaps be required, to notify and seek submissions from key or peak organisations that represent the people whom the exemption would negatively affect. That is basically a summary of the submission. I am happy to take questions in detail.

**The CHAIR** — Thank you. You spoke a bit about the experience of discrimination by LGBTI people in religious schools.

**Dr BENDALL** — Yes.

**The CHAIR** — Do you have a few examples, in general terms, of cases and how it might — —

**Dr BENDALL** — Yes; I do not have specific cases that I have actually gone to the tribunal over, but certainly anecdotally — —

**The CHAIR** — No, your experience anecdotally.

**Dr BENDALL** — Yes, that is right. Anecdotally we are certainly aware of some cases. It seems as though often those examples are selective in a sense, in that it is not necessarily that everybody who fits into a certain category is discriminated against by the religious school. But there is often some kind of dispute with the staff member involving other things, or the circumstances change, which bring it to a wider public attention — those sorts of things — and it is in those circumstances that the discrimination occurs. That is also one of the concerns, in that it does not necessarily seem to be something that is absolutely necessary to imbue a particular religious atmosphere at the place of employment, but in fact it is used, in a sense, once the circumstances change and the person does not have recourse to the law then.

**The CHAIR** — I suppose one of the counterarguments we have heard is that teachers can go to government schools and not face potential discrimination. I would like your thoughts about that.

**Dr BENDALL** — That is an argument in terms of the rights of the teachers. One of our concerns, though, is that even in religious schools we think students should be given a message about the diversity of the community and the way you treat people who do not believe the same things that you do. If you are in an enclave where the only people you ever mix with are people of the same mind as you, and you are not taught to respect people who think differently to you — i.e., you can sack people simply because you disagree with them — we do not think that is a very useful atmosphere for students to be in either, apart from the rights of the teachers and other staff.

The other thing is that it is not just teachers, it is all staff, so that the discrimination could be against cleaners in schools as well. We do not see what role they play at all in furthering the particular philosophy of religious education in a particular institution.

**Mr LANGUILLER** — Thank you for your submission. From your experience, how much discrimination is there, in reality? Can you cite one or two examples? If I may, are there any distinctions to be made between the various faiths? I mean, not everybody is the same — we have Christians, Jews, Muslims, Hindus — you name it. Are there any experiences that you might think are useful to us?

**Dr BENDALL** — In a sense it is difficult to know exactly how much discrimination there is, partly because the law is the way it is. If there is discrimination, people do not have recourse to complain. For that reason they do not get to a tribunal, or the matter is not referred to conciliation at the equal opportunity commission because the law simply does not allow that to happen. The other thing is that certainly people would modify their behaviour to a large extent so that they are much less publicly identifiable. They may feel discriminated against and oppressed, but that is not directly aimed at them in a sense because they are not sacked. They are not hired for those attributes.

Certainly, in terms of inquiries that we have received, there is a level of discrimination that people experience, and they will come to us and raise it informally, largely because there is not formal recourse that they can use.

**Mr LANGUILLER** — Can you think of one example that you can give me?

**Dr BENDALL** — Not off the top of my head, no. I would say also that it is not universal. Certainly it is not true of all Christian groups or all Jewish groups or even all Muslim groups. In a sense it is not practised universally even within particular Christian denominations. That is not the case.

**Mr SMITH** — Given Mr Languiller asked you if you had a specific example, and your answer was that you do not have one off the top of your head, and given the subject of today's hearings, I am surprised that if you claim there are examples, that you cannot think of one when you came here to talk about that exact subject.

**Dr BENDALL** — In terms of schools I do not have an exact example, but there is a case — —

**Mr SMITH** — Would it be fair to say that there are not any — —

**Dr BENDALL** — No, I do not think that is fair to say.

**Mr SMITH** — Or you cannot think of one at the moment?

**Dr BENDALL** — That is right.

**Mr SMITH** — Given the topic we are talking about, I would have thought you would have some examples.

**Dr BENDALL** — In a sense it is not the role of the lobby. While we are an advocacy group for the GLBTI community, we do not usually enter into individual negotiations with employers for people who are discriminated against.

**Mr SMITH** — I understand that.

**Dr BENDALL** — If that was our role, then I imagine we would be brought in more often and then I would have examples. One example I do have, but I cannot talk about it very much because my understanding is that it is still before the tribunal, is that there is a rural conference centre and camping ground that is owned by a Christian group which refused an organisation that provides counselling and support for same-sex identified — not necessarily gay and lesbian — young people who were seeking to book that facility to hold a conference. Once they discovered the nature of the organisation that was seeking to use their facilities, they refused them arguing that it would damage their religious sensibility. As nobody of that particular religion was going to be with them, it is very difficult to see how it was going to damage their religious sensibilities. This happened almost at the eleventh hour and the whole event had to be called off because of it.

We see that as a very important function of providing support to young people who are very vulnerable and who are already at risk in a sense, because lots of them self-harm and some of them commit suicide. It was not a very useful message for them to be given. That is the sort of example of blanket discrimination. We have no objection to some form of exception for religious groups, so that if the religious organisation could show it was actually going to damage their religious sensibilities or the tenets of their faith, then that kind of discrimination is arguable. But in this case they were providing a business in a sense. They were taking bookings for a public facility that would be open — —

**Mr SMITH** — It was a public facility?

**Dr BENDALL** — It is open to — —

**Mr SMITH** — But privately owned?

**Dr BENDALL** — It is privately owned, but it is like a hotel or a department store where you simply pay to use the facility. They refused simply on the basis of the organisation that sought to use it.

**Mrs PEULICH** — In your advocacy role are you aware of any test instances where members of the Victorian Gay and Lesbian Rights Lobby place themselves directly in conflict or confrontation with the most strident defenders of the exemptions as a way of drawing attention to their cause and perhaps to create some sort of controversy? I am a Catholic; my husband is not. Sometimes he goes to church with me. He knows that when he goes to a particular priest he should not line up for holy communion because he knows he is not a Mick and he is not going to get it. Another priest turns a blind eye. Why would people put themselves in a position where they assert their own rights at odds with rights that are diametrically opposite to them, but nonetheless are still

worthy of respect and regard just as the group you represent? Why would young people such as that go into a Christian facility, and not go to a facility that is more sympathetic to their cause?

**Dr BENDALL** — Admittedly I am not familiar with absolutely every aspect, but I think it had to do with the location and the fact that it was a regional organisation. It was not that they picked out that facility based on anything other than the nature of the facility, what facilities were offered and where it was. So far as I am aware, they did not particularly pick a Christian facility looking for a fight. They simply wanted to use a facility in that location and were not expecting them to say no, and they were surprised when they did.

Across the gamut of services that are offered by religious groups, given the outsourcing that government has done as well, sometimes only welfare or other types of facilities are offered in a particular area. They may be offered by Christian groups and there is not a choice as to whether you will go to a secular or religious services; you simply have the offer of a service. At the moment, if it is offered by a religious group, they can discriminate against you.

**The CHAIR** — I have a question about private clubs and freedom of association. I have been asking everyone the same question.

**Mrs PEULICH** — It is a double-edged sword.

**Dr BENDALL** — That is right.

**The CHAIR** — I suppose the issue of private clubs has preoccupied us all day in terms of whether there is an issue of freedom of association and whether it is discrimination. What is your group's position on that exemption for private clubs?

**Dr BENDALL** — In a sense there are a number of GLBTI-identified businesses which have sought to discriminate as well, so we are conscious of that, but they have gone to VCAT and made their argument that it is justified. That would be our preferred model for those private clubs as well.

For instance, the Peel Hotel was granted an exemption to exclude females on particular nights, largely because it was arguing that for particular functions — as I understand; I mean I am not associated with the Peel Hotel — if they allowed females in, heterosexual males attended as well and that caused trouble. While they were not going to say that women could never attend, they wanted the opportunity on particular occasions to say that they would only have males attending. Our view would be that if you can make an arguable case that that is desirable for your members and there is a good reason for it, you should make that case; you should not be given a blanket exemption, whether you are a gentlemen's club in Collins Street or a gay pub in Collingwood.

**Mr SMITH** — I just want to clarify some comments that seem at odds with each other. In your submission you make the comment that whether it is an unmarried but pregnant maths teacher or a gay teacher, their marital status or sexual orientation has no bearing on their ability to teach. You seem to be intimating that the teacher's job is to teach, and if they can teach, then that is fine. But on the other hand, in your evidence here you are saying that by not allowing homosexual teachers to come in, you are not teaching the kids around you respect for others and tolerance and that sort of thing. On the one hand you are saying teachers are there to teach, but on the other hand you are saying teachers do more than teach; they are actually there to show a particular type of behaviour as well. I would just like you, if you could, to tell me how those two thoughts can be clarified.

**Dr BENDALL** — I think my point was more about the way the management of the school is seen to treat individuals and whether you treat people with respect even when they do not agree with you. But I would agree that I think teachers are there to do more than teach.

**Mr SMITH** — Most definitely.

**Dr BENDALL** — But again my argument would be if the behaviour of the teacher actually damaged the religious sensibilities or the ability to practice the religion, then there might be an argument for discrimination to occur. If all they are doing is teaching maths, but the school knows they are gay or they are not married, then that is our point I think that it has nothing to do with the way they are teaching.

**Mr SMITH** — I think the argument you will get from the faith-based schools is that teachers are doing more than just teaching maths; they are actually trying to embody a set of values as well — that is, not just the management of the school but the individual employees.

**Mrs PEULICH** — Just say that human development in society, which is an accredited year 11 and year 12 subject, does more than just teach the subject matter, and the argument is that somehow it may be okay to discriminate to preserve the rights of religious schools or faith schools to determine who teaches the religious subject — it really is broader than that, isn't it?

**Dr BENDALL** — We would argue that really the criteria should be whether or not you can show respect for the religious sensibilities as well — for instance, I am a very publicly gay man, and I have worked for church organisations. I worked for a Uniting Church organisation in New South Wales, and one of the criteria was that you were able to respect and show conformity to an extent with the sensibilities of the organisation. While I was employed there and while I was engaged in anything I did for them, I did. The fact of what I did when I went home had no bearing on what I was doing at all. We would argue that that should be the same for a school. It was a children's welfare organisation, in fact. I was not saying that anything the Uniting Church said was bogus or wrong or anything else. If I was, I would have seen that I was in conflict with my duties as an employee and that I could not perform the essential criteria of the job, basically, if that were the case.

**Mr LANGUILLER** — I just come back to the point — I think the committee will hear opposing views to yours, as you would appreciate. I think it is important that, if you were to remember examples, that you furnish the committee with examples; that you actually give us some examples. Certainly for me as an individual member of this committee, it is important that when you talk about discrimination that you are actually able to articulate that and give us one or two examples. Can you do that at a later stage, if you want? I would appreciate that.

**Dr BENDALL** — Certainly we have some members of the organisation who actually are — I am a lawyer as well — practising lawyers and in more direct advocacy roles who would certainly be able to do that.

**Mr LANGUILLER** — Thank you.

**The CHAIR** — We will go into deliberations in a few weeks, so if your organisation can make some examples available, it would be pretty useful. With that, Anthony, thanks a lot for that contribution and your interest in the work of this committee. It is very much appreciated. Thanks very much.

**Dr BENDALL** — Thank you.

**Witness withdrew.**